JAMES L. PUTMAN

IBLA 84-855 Decided October 29, 1985

Appeal from a decision of the Fairbanks Alaska, District Office, Bureau of Land Management, dismissing private contest complaint challenging homestead entry. F-19730.

Affirmed as modified.

1. Homesteads (Ordinary): Contests--Homesteads (Ordinary): Preference Rights--Rules of Practice: Private Contests

BLM may properly dismiss a private contest complaint challenging the validity of a homestead entry in Alaska as moot where an independent basis for cancelling the entry, which is a matter of record with BLM, arises prior to expiration of the time for filing an answer to the complaint and BLM subsequently cancels the entry on that basis. In such circumstances, the contestant has not procured cancellation of the entry and, hence, is not entitled to a preference right under 43 U.S.C. § 185 (1970).

APPEARANCES: James L. Putman, pro se.

OPINION BY ADMINISTRATIVE JUDGE GRANT

James L. Putman has appealed from a decision of the Fairbanks, Alaska, District Office, Bureau of Land Management (BLM), dated July 23, 1984, dismissing his private contest complaint challenging the homestead entry, F-19730, of Walter K. Spurlin, Jr.

On December 11, 1973, Spurlin filed a notice of location of a homestead claim under the Act of May 14, 1898, as amended, 43 U.S.C. § 270 (1970) (repealed, effective Oct. 21, 1976, by section 703(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2789, subject to valid existing rights), for land situated in protracted sec. 4, T. 2 S., R. 19 W., Fairbanks Meridian, Alaska, asserting "settlement or occupancy" commencing on September 8, 1973. By notice dated March 11, 1974, BLM informed Spurlin that final proof of his entitlement to the claim was due "on or before December 10, 1978." On November 11, 1974, Spurlin informed BLM that he had started but not completed work on a "house" on the land and that because of the onset of winter it was "impractical" to move his family into the house until it was finished. He requested a 6-month extension of time

"to get them moved in and completely settled on the land." By decision dated November 13, 1974, BLM, denied Spurlin's request for an extension of time to establish a residence on the land, as required by 43 CFR 2567.5(a)(1).

By notice dated August 9, 1978, BLM reiterated to Spurlin that the time for submitting final proof would expire on December 11, 1978, i.e., "within 5 years from [the] date of the filing of notice of settlement." BLM further stated: "Failure to file proof before the expiration of 5 years allowed to submit proof will result in holding your homestead for cancellation."

On December 5, 1978, just prior to the deadline for submitting final proof with respect to the Spurlin homestead entry, appellant filed a private contest complaint challenging the validity of the entry, pursuant to 43 CFR 4.450-1. 1/ Appellant challenged the entry on the basis that there had been no cultivation of the land, as required by 43 CFR 2567.5(b):

> On August 25-27, 1978 I entered the subject land on foot, traversing the boundaries and crossing the interior section many times to determine residence and whether any cultivation had been done upon the land. No sign of cultivation exists anywhere on the homestead. * * * I did observe improvements to the land that would indicate appropriation of the land by the contestee. These were corner staking, base camps, line clearing and cutting, tree cutting and clearings.

The allegations of the complaint were supported by the statement of a witness, James R. Tibbs, dated December 2, 1978, who accompanied appellant onto the land.

In its July 1984 decision, BLM dismissed the contest complaint because by the time the allegations of the contest complaint were properly deemed admitted (January 11, 1979, i.e., 30 days after service of the complaint where no answer was filed) the records of BLM showed that the claim was properly subject to cancellation for failure to file final proof, citing Joe O. Amberger, 43 IBLA 178 (1979). In addition, BLM stated that Spurlin had failed to establish a residence within 6 months after recording the notice of location, i.e., by May 11, 1974, as required by 43 CFR 2567.5(a)(1), which likewise subjected the claim to cancellation. BLM concluded that

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1/ On Dec. 18, 1978, appellant submitted proof that the complaint had been sent by certified mail (return receipt requested) to Spurlin at his address of record, in accordance with 43 CFR 4.422(c). This evidence indicated that appellant had mailed the complaint on Dec. 6, 1978, and also that it was returned by the post office on Dec. 11, 1978, with the notation: "Moved -- Left No Address." Under 43 CFR 4.422(c)(3), the complaint is deemed to have been served "at the time * * * of the return by the post office of an undelivered registered or certified letter." There is no indication in the record that Spurlin filed an answer to appellant's complaint "[w]ithin 30 days after service of the complaint," as required by 43 CFR 4.450-6. In such circumstances, 43 CFR 4.450-7(a) provides that "the allegations of the complaint will be taken as admitted by the contestee and the manager will decide the case without a hearing."

appellant is not entitled to a statutory "preference right" to file on the land where his contest did not result in the cancellation of the Spurlin homestead entry because the entry "was subject to cancellation for independent reasons of record and not as a result of the private contest."

BLM also issued a July 23, 1984, decision cancelling Spurlin's homestead entry pursuant to 43 CFR 2511.3-4(a)(1), because he had failed to file final proof by December 11, 1978.

In his statement of reasons for appeal, appellant contends he is entitled to a statutory preference right to file on the land, because his complaint, filed prior to the expiration of the 5-year period for filing final proof, supplied evidence, not of record with BLM, which would have subjected the Spurlin homestead entry to cancellation. Appellant states that "the extinguishment of Spurlin's entry was caused by the contest." Appellant argues that prior to December 11, 1978, there was no evidence of record with BLM that the Spurlin entry was subject to cancellation, and disputes the asserted failure of the entryman to establish a "residence" within 6 months after recording the notice of location.

The BLM decision indicates that failure to establish a residence within 6 months after recording the notice of location was another basis of record for cancelling the Spurlin entry at the time appellant's complaint was filed. See Richard L. Nevitt, 47 IBLA 257 (1980), aff'd, Nevitt v. Andrus, Civ. No. A-80-226 (D. Alaska June 15, 1985). BLM relies on a November 8, 1984 letter from Spurlin, received on November 11, 1984, which stated: "I have work started on, but not completed, our house in order for it to be completely habitable this winter. If the ice on the river is safe I plan a trip over to the homestead within a week. I will try to continue and complete work on the house." In addition, as noted above, Spurlin requested a 6-month extension of time "to get [his family] moved in and completely settled on the land. * * * We have livestock that has to be sheltered." BLM treated this letter as an application for an extension of time to establish a residence pursuant to 43 CFR 2567.5(a)(1), which provides that "an extension of not more than six months may be allowed upon application duly filed." BLM denied the application in a November 13, 1984 decision. However, BLM made no finding that Spurlin had failed to establish a residence pursuant to 43 CFR 2567.5(a)(1). Moreover, we cannot conclude that the November letter from Spurlin establishes that he had failed to comply with that regulation. The letter indicates a house had been "started" but had not been completed so as to be "completely habitable." However, Spurlin was admittedly concerned that the house be habitable for his family. There is no statement as to when the house had been started or its actual condition. In his notice of location filed December 11, 1973, Spurlin stated that he had spent September 8-15, and October 10-14, 1973, on the homestead claim, "setting up a camp to work from." The evidence is sufficiently ambiguous that we are unable to affirm dismissal of appellant's contest on the ground that the facts of record prove the failure of the contestee to establish residence. 2/

2/ In order to establish a "residence" an entryman must physically be present on the homestead claim with an intent to remain. United States v.

[1] The applicable regulation, 43 CFR 4.450-1, provides that "[a]ny person * * * who seeks to acquire a preference right pursuant to the Act of May 14, 1880, as amended, (43 U.S.C. 185), * * * may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management." (Emphasis added.) It is well established that a private contest complaint which offers reasons in opposition to an adverse claim which are a matter of public record is properly dismissed on that basis. Winegeart v. Price, 74 IBLA 373, 379, 90 I.D. 338, 341 (1983), and cases cited therein. In the case of a contestant seeking a preference right under section 2 of the Act of May 14, 1880, as amended, 43 U.S.C. § 185 (1970) (repealed effective October 21, 1986, with respect to public lands in Alaska by section 702 of FLPMA, 90 Stat. 2787 (1976)), the contest is subject to dismissal because "the legislative purpose of the preference right would hardly be served by a contestant's informing BLM of what it is already aware." Wright v. Guiffre, 68 IBLA 279, 284 (1982), aff'd, Civ. No. 83-1148 (D. Idaho June 10, 1984).

We conclude that when appellant initiated his contest by filing a complaint on December 5, 1978, he alleged a reason for cancellation of Spurlin's homestead entry which was not a matter of public record. The regulation at 43 CFR 2567.5(b) requires in the case of a homestead entry that there be "cultivation of one-sixteenth of the area of the claim during the second year of the entry and of one-eighth during the third year and until the submission of proof." See 43 U.S.C. § 164 (1970) (repealed effective Oct. 21, 1986, by FLPMA section 702, 90 Stat. 2787). In addition, the regulation provides: "Cultivation, which must consist of breaking of the soil, planting or seeding, and tillage for a crop other than native grasses, must include such acts and be done in such manner as to be reasonably calculated to produce profitable results." 43 CFR 2567.5(b).

Appellant's complaint indicates he went on Spurlin's homestead claim during the fifth year of the entry and observed no cultivation despite traversing the land "many times." This allegation was corroborated by a witness, in accordance with 43 CFR 4.450-4(c). This evidence indicated Spurlin had failed to comply with 43 CFR 2567.5(b) to the extent that one-eighth of the land was not under cultivation every year until submission of final proof. If appellant's allegation had been proven or deemed admitted, the homestead entry would properly have been cancelled. See Richard L. Nevitt, supra.

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fn. 2 (continued)
Nelson (On Judicial Remand), 28 IBLA 314 (1977), aff'd, Nelson v. Andrus, 438 F. Supp. 551 (D. AK. 1977), rev'd, on other grounds rev'd sub nom., Nelson v. Interior Board of Land Appeals, 598 F.2d 531 (9th Cir. 1979). The existence of another residence, i.e., off-entry dwelling, which is occupied at times by the entryman and/or his family does not defeat the establishment of "residence" on the claim; however, it does raise a presumption that the entryman does not have the requisite intent to remain, which must be weighed in the context of all of the evidence. Id. The requirement to have a "habitable house" is a separate requirement, which must be satisfied "at the time proof is submitted." 43 CFR 2567.5(c).

Moreover, the record indicates that the alleged failure of the entryman to cultivate the land was not known to BLM at the time appellant's complaint was filed because BLM had not inspected the land. By memorandum dated July 8, 1975, a compliance check of the entry had been requested, including determining whether there was any cleared area or cultivation of crops. However, such a check was apparently not made.

Accordingly, the issue raised is whether BLM may dismiss a private contest of a homestead entry and defeat the preference right afforded by 43 U.S.C. § 185 (1970) where, subsequent to the filing of the contest and prior to the expiration of time for the contestee to answer, the homestead entry becomes subject to cancellation for a matter appearing on the records of BLM--the failure to file final proof within 5 years as required by 43 CFR 2511.3-4(a)(1). The question must be answered in the affirmative.

Section 2 of the Act of May 14, 1880, as amended, affords a preference right in certain circumstances:

> In all cases where any person has contested, paid the land office fees, and procured the cancellation of any * * * homestead * * * entry, he shall be notified by the officer designated by the Secretary of the Interior of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands * * *. [Emphasis added.]

43 U.S.C. § 185 (1970). Thus, under the statute, the preference right in the contestant does not arise until he has "procured the cancellation" of the homestead entry. In the present case, BLM cancelled the Spurlin entry in a separate proceeding and on a different basis than alleged by appellants. Under the circumstances, we cannot find that appellant procured cancellation of the homestead entry.

In Paul Unruh, 8 IBLA 231 (1972), we concluded that a private contestant will be deemed to have earned a preference right under 43 U.S.C. § 185 (1970) where the homestead entry was cancelled by an administrative law judge after a hearing on the contest, even though the Government had intervened in the contest, subsequently filed its own complaint, and introduced independent evidence supporting a cancellation. We held that both the private contestant and the Government could be said to have procured the cancellation. We further stated:

> The preference right given by statute is in the nature of a reward to an informer. The person who first initiates charges of noncompliance by a homestead entryman with the mandatory requirements of the law and subsequently supports his allegations with proof at a hearing on the contest is entitled to the preference right given by the statute after cancellation of the homestead entry, even though other contest proceedings against the same homestead entry may have been instituted by the government and heard at the same hearing.

Paul Unruh, supra at 234.

In Winegeart v. Price, supra the Board declined to affirm dismissal of a contest on the ground it was subject to rejection on the basis of facts of record contained in a BLM field report asserting nonresidency. The reason for this result was that the record was inconclusive on the issue of residency at the time the contest was filed and at the time it was subsequently dismissed.

The key to the issue is the question of whether appellant procured cancellation of the homestead entry. The case at hand is distinguishable from both Winegeart v. Price, supra and Paul Unruh, supra. In Winegeart, the issue of residency raised by the contest and the BLM field report was still an open issue on the record at the time the contest was dismissed. In Unruh, contestant had alleged and proven at a hearing facts which were not a matter of public record and were sufficient to cancel a homestead entry. In Unruh the Board found that the contestant had procured the cancellation of the homestead entry and, hence, reversed the decision finding he had obtained no preference right. In the present case, appellant alleged facts which were not of record and which would justify cancellation of the homestead entry. However, before the issue could be joined in a hearing or resolved by default for failure of contestee to answer, the homestead entry became subject to cancellation for a reason appearing on the record--the failure to file final proof. Under these circumstances, appellant cannot be held to have procured cancellation of the homestead entry.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

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C. Randall Grant, Jr.
Administrative Judge

We concur:

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Gail M. Frazier
Administrative Judge

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Franklin D. Arness
Administrative Judge